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In The
Supreme Court of the United States

THOMAS E. KEMP, JR., Chairman of the Oklahoma Tax Commission; JERRY JOHNSON, Vice-Chairman of the Oklahoma Tax Commission; and CONSTANCE IRBY, Secretary-Member of the Oklahoma Tax Commission,

Petitioners,

v.

OSAGE NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the U.S. Court of Appeals for the Tenth Circuit correctly held that the proper standard for determining whether the Eleventh Amendment is a bar to Respondent's action is found in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002), requiring that a court "need only conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective?"

2. Using the *Verizon Maryland* standard, whether the U.S. Court of Appeals for the Tenth Circuit correctly held that the relief sought by Respondent "is prospective in caption and substance" and, thus, not barred by the Eleventh Amendment?

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Respondent, Osage Nation (the "Nation"), a federally-recognized Indian tribe, respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari submitted by Petitioners, the Oklahoma Tax Commissioners, ("Petitioners" or "Commissioners"), to review the order and judgment of the United States Court of Appeals for the Tenth Circuit. The Nation submits that the Court should deny the Petition since there is no compelling reason to review the Tenth Circuit's ruling that the Nation's suit may proceed under the *Ex parte Young*[1] exception.

STATEMENT OF THE CASE

In 2001, the Osage Nation instituted this action in federal court seeking declaratory relief under the Declaratory Judgment Act[2] that its reservation is and remains Indian country and, from that declaration, an order enjoining Petitioners from collecting income taxes from the Nation's members who both reside and earn that income from sources within Indian country. The Nation's action was not brought on behalf of any particular tribal member; rather, the claim is based on well-established federal law recognizing that a state cannot levy and collect taxes against a tribe or tribal members in Indian country absent

[1] 209 U.S. 123 (1908).

[2] 28 U.S.C. § 2201.

congressional authorization.[3] At no time in this litigation has the Nation suggested that its request for relief should apply *retroactively* to allow for an award of tax refunds to tribal members[4] or to take away lawful authority from Petitioners or the State of Oklahoma itself. Rather, all suggestions of what *might* happen should the Nation be successful on the merits are theoretical scenarios, created by Petitioners, and not based on the actual relief being sought by the Nation. Moreover, Petitioners frame their Questions Presented solely around the Nation's request for declaratory relief as to the Indian country status of the Nation's reservation, but, to be accurate, the injunctive relief against future unlawful taxation is the true basis for the Nation's claim under *Ex parte Young*.

The court of appeals held that the Eleventh Amendment was not a bar to the Nation's suit against the Commissioners. Relying on this Court's holding in *Verizon Maryland*, the court of appeals conducted "a straightforward inquiry into whether

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[3] *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114 (1993); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973).

[4] Contrary to the State's assertion in its "Questions Presented," the Nation's request for injunctive relief does not concern the findings of any state tax officials in administrative tax refund cases. Rather, the Nation seeks to enjoin the state tax officials from *prospectively* levying and collecting tax from the income of tribal members who both earn that income and reside in the Nation's Indian country. Simply put, the Nation's request for relief does not pertain to any administrative tax refund procedures.

the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective" (Pet. App. at 16a) or whether the relief sought was the "functional equivalent of impermissible retrospective relief." (Pet. App. at 18a). The court of appeals concluded the Nation's relief was prospective *both* in caption and substance and that the suit against the Commissioners was not barred by the Eleventh Amendment.

In reaching its holding, the court of appeals also considered this Court's *Coeur d'Alene*[5] decision but determined that *Coeur d'Alene* was distinguishable from the instant case based on the relief being sought by the Nation. Petitioners request that this Court clarify what remains of *Coeur d'Alene* after *Verizon Maryland* when (as Petitioners articulate it) the suit challenges core state sovereignty interests. However, review by this Court is not necessary since *Verizon Maryland* made it clear what the appropriate inquiry should be when considering whether a suit may proceed under *Ex parte Young*. To the extent a court should also consider *Coeur d'Alene* in the analysis, the court of appeals did in fact make a determination that even *Coeur d'Alene* was not a bar to the Nation's action. Finally, not only is the relief sought by the Nation clearly distinguishable from the relief sought in *Coeur d'Alene*, the impact to any state sovereignty interests is minimal. This case does not present a

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[5] *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

compelling reason for this Court to grant the petition for a writ of certiorari.

Factual Background

By the Act of June 5, 1872, ch. 310, 17 Stat. 228, Congress established for the Nation a reservation of lands within the (former) Indian Territory in Oklahoma. The Act, titled "An Act to confirm to the Great and Little Osage Indians a Reservation in the Indian Territory," provides in pertinent part:

> That in order to provide said Osage tribe of Indians with a reservation, and secure to them a sufficient quantity of land suitable for cultivation, the following described tract of country, west of the established ninety-sixth meridian, in the Indian Territory, be, and the same is hereby, set apart for and confirmed as their reservation, namely: Bounded on the east by the ninety-sixth meridian, on the south and west by the north line of the Creek country and the main channel of the Arkansas river, and on the north by the south line of the State of Kansas. . . .

Since the Nation's reservation was established in 1872, the Nation has occupied and maintained a continuous presence in its reservation with its governmental headquarters currently located in Pawhuska, Oklahoma. On June 28, 1906, 34 Stat. 539, Congress enacted the Osage Allotment Act that, with the exception of several acres reserved for governmental purposes, allowed for the Osage Reservation to be allotted in its entirety to tribal members. As a

result, no surplus lands were to be required opened for non-Indian settlement. Nothing in the Osage Allotment Act, in its operative language, or otherwise, "restores" the lands of the Nation to the "public domain." The Osage Allotment Act clearly provides for the lands of the Osage Reservation to be divided as equally as was practicable among the Osage tribal members, rather than to the public domain. *See* 34 Stat. 539, 540. Contrary to Petitioners' suggestion, a reservation that had its lands allotted does *not* necessarily mean the reservation boundaries have been disestablished or terminated. Rather, this Court has developed an analytical structure to determine whether Congress has evidenced its intent to alter the legal status of an Indian reservation. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962).

Likewise, the Commissioners' argument that Oklahoma's entry into the Union disestablished the Osage Reservation boundaries is without merit. The Oklahoma Enabling Act, an act of Congress admitting Oklahoma into the Union in 1906, specifically preserved federal authority over Indians, Indian lands, property, and other rights by treaties or other agreements. *See* Oklahoma Enabling Act, ch. 3335, § 1, 34 Stat. 267, 267-68 (1906). In fact, four years after Oklahoma's statehood, a federal appellate court expressly rejected the proposition that Oklahoma's entry into the Union dissolved all Indian country

within the (former) Indian Territory. *United States Express Co. v. Friedman*, 191 F. 673, 679-80 (8th Cir. 1911) ("[T]he states are equal in power, and a new state, when admitted, is clothed with all the powers of the original states [citations omitted]; but the power of Congress over Indian relations is plenary and has no relation to state lines. . . .").[6]

Moreover, there are other sections within the Oklahoma Enabling Act that reference the continual existence of the Osage Reservation after statehood. Section 2 of the Oklahoma Enabling Act provides in pertinent part:

> [A]nd all persons qualified to vote for said delegates shall be eligible to serve as delegates; and the delegates to form such convention shall be one hundred and twelve in number, fifty-five of whom shall be elected

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[6] The U.S. Court of Appeals for the Tenth Circuit in *Indian Country, U.S.A. v. State of Oklahoma*, 829 F.2d 967 (10th Cir. 1987) specifically referenced the effect of the Oklahoma Enabling Act to Indian interests in the newly formed State and noted:

> The language of the Oklahoma [Enabling Act], read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in the new State of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians, and dissolving completely the tribally-owned land base – events that never occurred and goals that Congress later expressly repudiated.

Indian Country, U.S.A., 829 F.2d at 979-80.

> by the people of Indian Territory, and two shall be elected by the electors ***residing in the Osage Indian Reservation*** in the Territory of Oklahoma; and the governor, the chief justice, and the secretary of the Territory of Oklahoma shall apportion the Territory of Oklahoma into fifty-six districts, as nearly equal in population as may be, except that such apportionment shall include as ***one district the Osage Indian Reservation***, and the governor, the chief justice, and the secretary of the Territory of Oklahoma shall appoint an election commissioner who shall establish ***voting precincts in said Osage Indian Reservation***, and shall appoint the judges for election in ***said Osage Indian Reservation***; and two delegates shall be elected from said Osage district . . . [t]hat ***in said Indian Territory and Osage Indian Reservation***, nominations for delegate to said constitutional convention may be made by convention. . . .

(emphasis added).

Section 3 of the Enabling Act provides:

> Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as ***the Indian Territory and the Osage Indian Reservation*** and within any

> other parts of said State which existed as Indian reservations. . . .[7]

(emphasis added).

> Section 21 of the Enabling Act provides:
>
> That the constitutional convention may by ordinance provide for the election of officers for a full State government, including members of the legislature and five Representatives to Congress, and shall ***constitute the Osage Indian Reservation*** a separate county, and provide that it shall remain a separate county until ***the lands in the Osage Indian Reservation*** are allotted in severalty and until changed by the legislature of Oklahoma, and designate the county seat thereof. . . .

34 Stat. 267, 268-69, 277 (emphasis added). The direction under § 21 of the Enabling Act was carried out in Art. XVII, sec. 8 of the Constitution of the State of Oklahoma which provides that ***"[t]he Osage***

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[7] Notably, the language in the Oklahoma Enabling Act references the Osage Indian Reservation as a whole without distinguishing between any allotted parcels of land within the reservation. Also, section 3 of the Enabling Act clearly references the Osage Indian Reservation in its *present* tense form ("now known as . . . the Osage Indian Reservation. . . .") while making reference to other Indian reservations in Oklahoma in a *past* tense form ("other parts of said State which existed as Indian reservations. . . ."). Clearly, Congress did not intend for the Enabling Act to be the basis for terminating the Osage Reservation upon Oklahoma's entry into the Union.

Indian Reservation with its present boundaries is hereby constituted one county to be known as Osage County . . . Pawhuska is hereby designated the County Seat of Osage County." To date, the Oklahoma Constitution still has this language.

Since the Osage Allotment Act of 1906, the entire subsurface mineral estate of the Osage Reservation ("Osage Minerals Estate") has been held in trust for the Osage Nation with mineral royalties belonging to Osage headright owners under a system established by federal law. The federal government is the trustee for the Osage Minerals Estate. In 2004, Congress enacted "An Act to reaffirm the inherent sovereign rights of the Osage Tribe to determine its membership and form of government." P.L. 108-431, 118 Stat. 2609. Through this Act, the Nation developed and adopted its own constitution that provided for its own form of government and reaffirmed the extent of its governmental authority over its territory. Prior to this, the Nation's governmental powers and authority over its affairs in its reservation were defined by acts of Congress. The 2004 Act did nothing to lessen any federal superintendence over the Osage Reservation, but, rather, the Act simply reaffirmed the sovereign authority of the Nation to exercise powers of self-government on its own instead of through acts of Congress.

The instant suit was brought by the Nation for the purpose of enjoining the Commissioners from

continuing to levy and collect taxes from the income of the Nation's members who both earn that income and reside within the boundaries of the Nation's reservation, based on well-established federal law. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450 (1995); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). The Petitioners' explanation for its continued taxation against tribal members in the Nation's reservation (except for trust or restricted land) is that the State has been asserting its authority and sovereignty over the reservation since statehood. Whether this explanation is wholly accurate or not is beside the point since Petitioners fail to understand that only Congress has plenary authority over Indian affairs and that the State has no authority to unilaterally alter the legal status of an existing Indian reservation simply by asserting its jurisdiction there. *See, e.g., Indian Country, U.S.A.*, 829 F.2d at 974 (finding that a tribe's past failure to challenge Oklahoma's jurisdiction over reservation lands does not negate congressional intent to treat those lands as Indian lands under exclusive federal supervision).

The Nation instituted this action in federal court seeking declaratory relief under the Declaratory Judgment Act that its reservation is and remains Indian country and, from that declaration, an order enjoining Petitioners from collecting income taxes

from the Nation's members who both reside and earn that income from sources within Indian country.

REASONS TO NOT GRANT THE WRIT OF CERTIORARI

The decision of the court of appeals is correct. The court of appeals carefully considered and applied this Court's precedent pertaining to Eleventh Amendment challenges by a state and correctly determined that this suit may proceed in federal court. Petitioners attempt to manufacture a conflict in the circuits as to the law that should be applied when, in actuality, the circuits are applying the same law, but are simply reaching different results based on the facts. There exists no compelling reason for certiorari to be granted in this case.

1. Petitioners' principle reason for requesting that certiorari be granted in this case is that the Tenth Circuit supposedly did not take "state sovereignty and jurisdiction" into foremost consideration when conducting its analysis under *Ex parte Young*. Petitioners principally rely on *Coeur d'Alene* and claim that the Tenth Circuit did not apply it correctly in this case, and, notwithstanding how the Tenth Circuit applied it, there exists a conflict in the circuits as to how *Coeur d'Alene* should be applied. Both of these propositions are incorrect.

In conducting its analysis, the court of appeals was mindful of this Court's decision in *Coeur d'Alene* and, subsequently, *Verizon Maryland*. Contrary to Petitioners' position, the court of appeals did recognize the continued existence of *Coeur d'Alene* in its Eleventh Amendment analysis:

> [U]nder *Ex parte Young*, 209 U.S. 123 (1908), a party may sue individual state officers in federal court in their official capacity for prospective injunctive relief, so long as the suit does not fall within the narrow exception enunciated in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997).

(Pet. App. at 8a). Petitioners suggest that the court of appeals on its own decided to find *Coeur d'Alene* no longer controlling when considering Eleventh Amendment disputes. However, the court of appeals did in fact recognize *Coeur d'Alene* as a "narrow exception" to the *Ex parte Young* doctrine, and properly incorporated the *Coeur d'Alene* analysis into the framework established by this Court in *Verizon Maryland*.

Prior to this Court's decision in *Verizon Maryland*, the Tenth Circuit had applied *Coeur d'Alene* in a prior case, *ANR Pipeline Co. v. Lafaver*, 150 F.3d 1178 (10th Cir. 1998), and, based on this Court's direction in *Coeur d'Alene*, the Tenth Circuit at that time concluded:

> We read *Coeur d'Alene Tribe* as imposing an important new requirement on federal courts as part of the *Ex parte Young* analysis.

> In light of *Coeur d'Alene Tribe*, federal courts must examine whether the relief being sought against a state official "implicates special sovereignty interests." If so, we must ***then*** determine whether the requested relief is the "functional equivalent" to a form of legal relief against the state that would otherwise be barred by the *Eleventh Amendment*.

(emphasis added). *Id.* at 1190. In other words, the Tenth Circuit read *Coeur d'Alene* as requiring a federal court to, first, consider the relief being sought to determine if it "implicates special sovereignty interests" and, second, refer to the requested relief as pled to determine if, given the special sovereignty interests that are implicated, whether the requested relief amounts to relief that is barred by the Eleventh Amendment.

After the Tenth Circuit's ruling in *ANR Pipeline*, this Court issued its decision in *Verizon Maryland* that clarified the proper framework for an Eleventh Amendment analysis, to-wit:

> In determining whether the doctrine of *Ex parte Young* avoids an *Eleventh Amendment* bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." (citing *Coeur d'Alene*, 521 U.S. at 296).

Verizon Maryland, 535 U.S. at 645. In disagreeing with the Fourth Circuit's approach that disputed

whether the basis for the claim was ultimately inconsistent with federal law, this Court held that "the inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Id.* at 646 (citing *Coeur d'Alene*, 521 U.S. at 281).

Thus, it is apparent that this Court's framework under *Verizon Maryland* still includes the considerations that existed in *Coeur d'Alene* but only to the extent of determining, as in any *Ex parte Young* analysis, whether the relief is properly characterized as prospective in both caption and substance. This Court did not expressly overrule *Coeur d'Alene* in *Verizon Maryland*. As such, it becomes apparent that consideration of any "special sovereignty interests" remains part of the analysis, but only to determine whether the requested relief is the "functional equivalent" to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment. Although Petitioners would like a federal court to give more emphasis to any "special sovereignty interests" *prior* to conducting an inquiry into whether the complaint seeks prospective relief against an ongoing violation of federal law, such analysis is not the standard, per *Verizon Maryland*.

In its decision, the court of appeals correctly followed the approach outlined in *Verizon Maryland*. Citing to its decision in *Hill v. Kemp*, 478 F.3d 1236 (10th Cir. 2007), issued after *Verizon Maryland*, the Tenth Circuit noted:

> [T]he Supreme Court in *Verizon Maryland* clarified that the courts of appeals need not (and should not) linger over the question whether "special" or other sorts of sovereign interests are at stake before analyzing the nature of the relief sought. Thus, to the extent that our decision in *ANR Pipeline* read *Coeur d'Alene* as requiring "federal courts [to] examine whether the relief sought against a state official 'implicates special sovereignty interests,'" [cite omitted], we recognize today that *Verizon Maryland* abrogated this step.
>
> . . .
>
> Following the Supreme Court's most recent and definitive guidance in *Verizon Maryland*, the sole question for us becomes whether the relief sought by [Plaintiff] is prospective, not just in how it is captioned but also in its substance.

Id. at 1259. Here, the caption of the Nation's complaint seeks *prospective* injunctive relief that Petitioners be enjoined from continuing to levy and collect taxes from the income of tribal members within the Nation's Indian country.

As to the substance of the Nation's request for relief, the Tenth Circuit determined that the suit was not barred since it was not the "functional equivalent" of a relief that would otherwise be barred by the Eleventh Amendment. Contrary to Petitioners' view, the "special sovereignty interests" that existed in *Coeur d'Alene* were not ignored in the analysis.

Rather, as *Verizon Maryland* teaches us, consideration of any "special sovereignty interests" is conducted as part of – but not in place of – the "straightforward inquiry" to determine if the complaint seeks relief properly characterized as prospective. Admittedly, there are instances where the substance of a complaint, regardless of how it is captioned, amounts to a form of relief that would otherwise be barred by the Eleventh Amendment. However, as explained further below, the "special sovereignty interests" raised by Petitioners are not equivalent to those raised in *Coeur d'Alene* and, as the Tenth Circuit determined, do not amount to a form of relief that would otherwise be barred by the Eleventh Amendment.

The most common form of relief that would amount to an impermissible suit under the Eleventh Amendment is one that results in consequent significant implications on state funds. *See, e.g., Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (Federal courts may not award retrospective relief, for instance, money damages or its equivalent, if the State invokes its immunity); *Green v. Mansour*, 474 U.S. 64, 69 (1985) (the Eleventh Amendment barred the injunction ordering retroactive benefits because it was effectively an award of money damages for past violations of federal law). In fact, one of the concerns raised in *Coeur d'Alene* was the likely impact to Idaho's treasury should the tribe have prevailed. *Coeur d'Alene*, 521 U.S. at 287 ("if the Tribe were to prevail, Idaho's sovereign interest in its lands and

waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury.").

Notably, the Tenth Circuit in the *Hill* case, in its application of this Court's holding in *Verizon Maryland*, referred to the significant impact on the state's treasury that would likely arise in cases, like *Coeur d'Alene*, where a plaintiff sought to transfer ownership or possession of real property from the state. *Hill*, 478 F.3d at 1260. In footnote twenty-eight, the court in *Hill* stated:

> Lower courts that have found *Coeur d'Alene* applicable have involved just such circumstances. *See, e.g., Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18 (2nd Cir. 2004) (claiming that the State of New York was wrongfully in possession of 10 counties); *Ysleta Del Sur Pueblo v. Raney*, 199 F.3d 281 (5th Cir. 2000) (seeking to eject state officers from piece of real property); *MacDonald v. Vill. of Northport, Mich.*, 164 F.3d 964 (6th Cir. 1999) (seeking declaration that right-of-way that provided access to navigable waterway was the lawful property of plaintiffs).

Id. Thus, cases like *Coeur d'Alene* that seek a transfer of ownership or possession of land from the state, arguably, are cases that could have retroactive implications to the state's treasury and are cases that might otherwise be barred by the Eleventh Amendment. Such cases are the "functional equivalent [to]

impermissible retrospective relief" and are cases that cannot be maintained under *Ex parte Young*. However, as explained further herein, the Nation's suit does not seek a transfer of ownership or possession of land from the State or anyone and does not request relief in any manner that would have retroactive implications to the State's treasury. The Nation's suit clearly falls under *Ex parte Young*, both in caption and substance, and does not seek relief that would otherwise be barred by the Eleventh Amendment.

2. The cases cited by Petitioners do not establish that a conflict exists in the circuits. Petitioners cite to the Second Circuit case of *Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18 (2nd Cir. 2004), and the Sixth Circuit case of *Dubuc v. Michigan Bd. of Law Examiners*, 342 F.3d 610 (6th Cir. 2003), as those cases relied heavily on *Coeur d'Alene* while the Tenth Circuit in the instant case did not. However, upon careful review, nowhere in the Tenth Circuit's analysis did the court foreclose the application of *Coeur d'Alene* in the process. As previously stated, under this Court's *Verizon Maryland* analytical framework, a court must still determine that the relief sought – regardless of how it is captioned – is properly characterized as prospective. The Tenth Circuit in the instant case acknowledged that *Coeur d'Alene* did not allow a suit to proceed under *Ex parte Young* since "the tribe's suit was equivalent to a quiet title action and the relief sought would erase the state's regulatory authority over the dispute land." (Pet. App. at 15a). It thus is apparent that a

case involving a form of relief that is equivalent to a quiet title action with facts similar to *Coeur d'Alene* amounts to "the functional equivalent of impermissible retrospective relief" and, thus, barred by the Eleventh Amendment.

The cases of *Western Mohegan* and *Dubuc* are not inconsistent with this approach. In *Western Mohegan*, the Second Circuit referred to the "straightforward inquiry" requirement outlined in *Verizon Maryland* but nevertheless determined that the tribe's request for relief was "virtually identical" to the relief sought in *Coeur d'Alene*:

> To the extent that the complaint alleges that there has never been a lawful extinguishment of the Tribe's Indian title, it seeks a declaration from this court that New York's exercise of fee title remains 'subject to' the Tribe's rights . . . [t]hus, the relief requested by the Tribe is, as much as that sought in *Coeur d'Alene*, the functional equivalent of quiet the Tribe's claim to title in the New York counties named in the complaint.

Western Mohegan, 395 F.3d at 23.

Likewise, in *Dubuc*, the Sixth Circuit acknowledged the "straightforward inquiry" requirement under *Verizon Maryland* but found that the relief sought was not the "functional equivalent of a quiet title action that implicates a state's sovereign interest in its lands or waters." *Dubuc*, 342 F.3d at 617.

In *Western Mohegan* and in *Dubuc*, both circuit courts concluded that the "straightforward inquiry" under *Verizon Maryland* was the applicable standard and recognized that relief that was the "functional equivalent to a quiet title action" as in *Coeur d'Alene* remained a part of the analysis. This is not inconsistent with the Tenth Circuit's approach in the instant case; however, as explained below, the Nation's request for relief does not pertain to a dispute over land title and does not approach the level of impact to state sovereignty as existed in *Coeur d'Alene*. Petitioners are simply trying to carve out a conflict among the circuits when there is none.

Concluding that the Nation seeks relief that is prospective both in caption and substance, the Tenth Circuit properly allowed the Nation's suit to proceed under *Ex parte Young*. In doing so, the court correctly followed this Court's guiding principle outlined in *Verizon Maryland*. The Tenth Circuit's decision is thus in line with this Court's case law and, as such, there is no compelling reason for this Court to grant certiorari in this matter.

3. Assuming, arguendo, that *Coeur d'Alene* still requires a federal court to give foremost consideration to a state's "special sovereignty interests" similar in nature and substance to the interests raised in that case, the facts in the instant case are clearly distinguishable and do not rise to the level touching on significant sovereignty interests that existed in *Coeur d'Alene*. In *Coeur d'Alene*, the Coeur d'Alene Tribe of Idaho brought suit in federal court naming the State

of Idaho, various state agencies, and numerous state officials, claiming ownership in submerged lands and bed of Lake Coeur d'Alene and of the various navigable rivers and streams that form part of the lake's water system. *Coeur d'Alene*, 521 U.S. at 264-65. The Tribe also sought a declaratory judgment that would establish its entitlement to the *exclusive* use and occupancy and the right to quiet enjoyment of the submerged lands as well as declaration to invalidate the application of *all* state law as to the submerged lands. *Id.* at 265. Finally, the Tribe sought injunctive relief to prohibit the defendants from taking any action in violation of the Tribe's rights of exclusive use and occupancy, all consistent with its quiet enjoyment and other ownership interest in the submerged lands. *Id.*

This Court determined that while the Coeur d'Alene Tribe could not initiate a direct quiet title action against Idaho in federal court without the State's consent, the relief sought by the Tribe was "close to the functional equivalent of quiet title in that *substantially all benefits of ownership and control would shift from the State to the Tribe.*" *Id.* at 281-82 (emphasis added). Also, this Court noted that the injunctive relief sought against the named State officials would prevent those officials from exercising

their governmental powers and authority over the disputed land and waters.[8] *Id.* at 282.

The Nation's suit is markedly different from the suit brought in *Coeur d'Alene*. The most significant difference is that the Nation is *not* seeking to alter any form of ownership or control of land from the State of Oklahoma (or from any property owner) to the Nation. The Nation is *not* seeking any beneficial property interest in any land, whether submerged or not. The Nation is *not* seeking to eliminate the application of all state law to land within the Osage Reservation. Indeed, the Nation's request for injunctive relief is limited to a specific remedy (enjoin unlawful tax collection against tribal members) against specific defendants (Oklahoma Tax Commissioners).[9]

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[8] Notably, in *Coeur d'Alene*, this Court spent considerable effort detailing the significance of submerged lands and navigable waters to state sovereignty interests. The Nation's suit does not involve any transfer of ownership or control over any submerged lands or navigable waters within the Osage Reservation and, thus, any state sovereignty interests in submerged lands or waters are not being challenged here.

[9] Also, unlike in *Coeur d'Alene*, the Nation does allege that the Commissioners are acting beyond the authority conferred upon them by their own state regulations. *See* Oklahoma Administrative Code 710:50-15-2 (applying income tax exemption for tribal members who both reside and earn income from sources within, among other places, "formal and informal reservations" [citing 18 U.S.C. § 1151]). Thus, the Nation's suit is similar to *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982) where the state officials were found to be acting beyond the authority conferred upon them by the State.

It is clear from Petitioners' "Questions Presented" and the brief in support that the crux of Petitioners' reliance on *Coeur d'Alene* and the implication of the state's "special sovereignty interests" pertain to the Nation's request for a declaratory judgment that its reservation is and remains Indian country. However, the primary problem with the way Petitioners style the issue is that, in its suit, the Nation is *not* seeking to establish sovereignty and jurisdiction over a "historical" reservation that would divest the State of substantial jurisdiction and authority. The Petitioners are attempting to frame the issue in this case in line with the issue that existed in *Coeur d'Alene* when, in fact, they are not the same.

In *Coeur d'Alene*, the issue clearly involved an adjudication of ownership to submerged lands and bed of Lake Coeur d'Alene that would result in a transfer of title from the State to the Tribe.[10] From the transfer of ownership rights to the Tribe would flow the right to prohibit the application of State law and control over the lands and would clearly divest the State of authority and jurisdiction (unless other provided under federal law) over individuals and activity on those lands. This is similar to the request for relief sought by the tribal plaintiffs in the *Western*

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[10] It is noteworthy that the Coeur d'Alene Tribe eventually obtained beneficial ownership in the disputed lands when the United States successfully sued the State of Idaho on behalf of the Tribe to quiet title. *Idaho v. United States, et al.*, 533 U.S. 262 (2001).

Mohegan case cited by Petitioners. Unlike *Coeur d'Alene* and *Western Mohegan*, in this suit, the Nation is not seeking relief that would affect any ownership rights in real property; instead, the Nation seeks judicial acknowledgement of the boundaries of its Indian country under federal law.

A determination that land is Indian country is a matter of federal law and does not require a change in title or possession to real property.[11] When considering whether certain land is Indian country, this Court has determined that the appropriate inquiry starts with whether such land falls within one of the categories outlined in 18 U.S.C. § 1151. "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *Sac and Fox*, 508 U.S. at 123 (citing Section 1151); *see also Chickasaw Nation*, 515 U.S. at 453 ("'Indian country,' as Congress comprehends that term, see 18 U.S.C. § 1151, includes 'formal and informal reservations' . . . "). The Nation asserts that its Indian country consists of its

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[11] Since only Congress can disestablish reservation boundaries, any question regarding the continued status of reservation boundaries is a matter of federal law and an issue appropriate for adjudication in federal court. *See, e.g., South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District Court*, 420 U.S. 425 (1975); *Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962).

reservation lands, and, pursuant to § 1151(a), that includes *all* land within the reservation boundaries, not just restricted lands or lands held in trust within those boundaries. This does not, however, require that *any* land within the Nation's reservation change ownership or possession from the current owners (whether held as private property or State or county property) to the Nation.

Also, any significant alteration to applicable law in the reservation will be governed by the scope and limits of tribal jurisdiction in Indian country as determined by the Nation's own laws and as provided under federal law. This includes the limits set out by this Court for tribal jurisdiction over non-Indians in Indian country. *See, e.g., Plains Commerce v. Long Family*, 128 S.Ct. 2709 (2008) (holding that Tribe has no jurisdiction to adjudicate discrimination claim concerning non-Indian selling fee land to another non-Indian on a reservation); *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001) (holding that, with very limited exceptions, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian fee land within a reservation); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997) (tribal courts have no authority to adjudicate claims against nonmembers arising out of accidents on state highways running through a reservation); *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408 (1989) (Because Congress did not expressly delegate to the Yakima Nation the power to zone fee lands of nonmembers, the Yakima Nation does not have this

authority); *Montana v. United States*, 450 U.S. 544 (1981) (establishing standard for which a tribe may regulate activities of nonmembers or the conduct of non-Indians on fee lands within a reservation).

Contrary to Petitioners' suggestion, a determination that the Nation's reservation retains its Indian country status does not, in and of itself, divest the State of any lawful jurisdiction that it may otherwise assert in Indian country. Unlike the impact from a change in ownership or possession of land, complete authority by the State over land that is declared to be within Indian country – especially fee land owned by non-Indians – will not necessarily transfer to the Nation. The relief the Nation seeks is nowhere near the functional equivalent to a quiet title action and, thus, the impact to any sovereignty interests of the State does not rise to the level as seen in *Coeur d'Alene*.

Further, given the teaching of *Verizon Maryland*, it is proper to only consider the relief being sought by the Nation under a "straightforward inquiry" without considering the merits of the claim. Here, the Nation's request for relief pertains only to an injunction against unlawful state taxation in Indian country, and, as such, Petitioners' attempt to have the court consider implications that might arise based on the merits of the claim is not appropriate under *Verizon Maryland*. Any attempt to look beyond the pleading and substance of the Nation's suit is largely academic

at this point. The court of appeals conducted the proper standard in this case, and so there exists no compelling reason for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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